Supreme Court, U. S.
FILED
MAY 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-1176

In the Supreme Court of the United States

OCTOBER TERM, 1976

LILLIAN GOLDBERG, PETITIONER

v.

JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, whose remarriage before age 60 terminated her receipt of widow's disability benefits under Section 202(e)(1)(B)(ii) of the Social Security Act, 49 Stat. 623, as added and amended, 42 U.S.C. 402(e)(1)(B)(ii), contends that the government is estopped from terminating her benefits because a local Social Security Administration employee misinformed petitioner that her remarriage before attaining age 60 would reduce but not terminate her benefits.

Section 202(e)(1) of the Social Security Act grants benefits to widows who are (A) unmarried, *and* (B) *either* (i) over the age of 60 *or* (ii) over the age of 50 and disabled. Section 202(e)(4) provides that if a widow remarries *after* attaining the age of 60, the marriage will be disregarded.

except that her benefits will be reduced. A widow who remarries *before* attaining the age of 60, however, is simply no longer "not married" within the meaning of Section 202(e)(1)(A). Thus, if a disabled widow remarries before she reaches 60, her benefits are terminated because she does not satisfy the requirements of either Section 202(e)(1) or Section 202(e)(4); if the disabled widow waits until after she is 60 to remarry, she continues to receive benefits.

When petitioner was a 59 year-old widow receiving widow's disability insurance benefits under Section 202 (e)(1), she telephoned a representative in the local office of the Social Security Administration to ask advice about the possible effects of her forthcoming remarriage upon her receipt of disability benefits. Petitioner was informed that the marriage might reduce her benefits but would not terminate them. Relying upon this misinformation, petitioner married her present husband in May 1972, two months before her sixtieth birthday; as a consequence, she became disqualified under the Act from receiving further widow's benefits on the basis of her former husband's earnings account (Pet. App. A-2).

The Social Security Administration terminated petitioner's benefits, and the termination was upheld by the Secretary on administrative review (Pet. App. A-3).

Petitioner sought review in the United States District Court for the Eastern District of New York, contending that the misinformation given her by the local Social Security office estopped the government from finding her ineligible for benefits under Section 202(e). In the alternative, petitioner argued that Section 202(e) arbitrarily discriminates on the basis of marital status and age, in violation of the Equal Protection and Due Process Clauses of the Fifth Amendment.

The district court (Pet. App. A-8 to A-19; 411 F. Supp. 88) and the court of appeals (Pet. App. A-1 to A-7; 546 F. 2d 477) both rejected petitioner's contentions. Petitioner here contends only that the government is estopped from terminating her widow's benefits. The decision below on this issue was correct and does not warrant review.

The court of appeals correctly stated (Pet. App. A-6):

> It is well established that "estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government." *Byrne Organization Inc.* v. *United States,* 287 F. 2d 582, 587 (Ct. Cl. 1961).

See also, *e.g., Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380; *United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513; *United States* v. *Shaw,* 309 U.S. 495, 500-502; cf. *Immigration and Naturalization Service* v. *Hibi,* 414 U.S. 5.[1] That principle is particularly applicable where, as here, a claimant seeks social welfare benefits that the governing legislation does not grant. See, *e.g., Ewing* v. *Risher,* 176 F. 2d 641 (C.A. 10); *Terrell* v. *Finch,* 302 F. Supp. 1063 (S.D. Tex.); *Flamm* v. *Ribicoff,* 203 F. Supp. 507 (S.D. N.Y.); *Taylor* v. *Flemming,* 186 F. Supp. 280 (W.D. Ark.). As the court of appeals noted, "the government could scarcely function if it were bound by its employees' unauthorized representations" (Pet. App. A-7).

Petitioner relies (Pet. 7-9) on a number of lower court decisions that she claims stands for the proposition

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[1] *Moser* v. *United States,* 341 U.S. 41, which petitioner cites (Pet. 5-6), is inapposite. In that case, the Court expressly disavowed any reliance upon a theory of estoppel. 341 U.S. at 47.

that the government can be estopped by unauthorized representations whenever "basic notions of fairness require[ ] * * *." *United States* v. *Wharton*, 514 F. 2d 406, 411 (C.A. 9); *United States* v. *Lazy F C Ranch*, 481 F. 2d 985, 989 (C.A. 9). To the extent that they do so, they are contrary to the overwhelming weight of authority and to the controlling decisions of this Court. A doctrine of estoppel, particularly when applied with respect to a claim for money that the governing statute denies, would permit a court to override Congress' judgment and directive with respect to the allocation of social welfare funds.

In any event, each of the cases on which petitioner relies involved unusual circumstances not comparable to those presented here.[2] Petitioner cites no court of appeals' decision requiring, on grounds of estoppel, payment of

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[2]In *United States* v. *Wharton*, *supra*, government officials incorrectly informed an individual that there was no way he could perfect title to land his family had cleared and farmed for 36 years, and in reliance upon that advice he failed to perfect title in the remaining time actually available. In *United States* v. *Lazy F C Ranch*, *supra*, the government sought to recover money paid to individuals pursuant to contracts with the government entered into on the basis of official representations that the payments would be proper. In *Brandt* v. *Hickel*, 427 F. 2d 53 (C.A. 9), government officials informed applicants for an oil and gas lease that they would not lose their priority if they refiled a corrected application within thirty days, and the Secretary of Interior later determined that another application filed within that time had priority. In *Schuster* v. *Commissioner*, 312 F. 2d 311 (C.A. 9), the Commissioner of the Internal Revenue Service originally determined that certain estate assets were not taxable and subsequently changed his mind and sought to assess the trustee for a deficiency after the trustee had distributed the assets. In *Fox* v. *Morton*, 505 F. 2d 254 (C.A. 9), the government claimed that a particular program for Indians was a jobs program, not a general assistance program that would have entitled participants to a hearing upon the termination of benefits; the court found that the program was in fact an assistance program, and noted incidentally that the government itself described the program as a general assistance program in the program contracts.

social welfare benefits to a claimant who does not satisfy the eligibility conditions established by Congress. Accordingly, while some appellate decisions, particularly those of the Ninth Circuit, may reflect a general approach to estoppel that is at odds with the settled principle that was correctly applied in this case, that conflict in approach does not warrant further review of the decision below.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.